

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

RAFAEL SERRANO,

Plaintiff,

v.

CAROLYN W. COLVIN, Acting
Commissioner of the Social Security
Administration,

Defendant.

Case No. 2:13-cv-01214-JAD-PAL

**REPORT OF FINDINGS AND
RECOMMENDATION**(Mtn to Remand – Dkt. #12)
(Cross Mtn Affirm – Dkt. #15)

This case involves judicial review of administrative action by the Commissioner of Social Security denying Plaintiff Rafael Serrano's claim for disability benefits under Title II of the Social Security Act (the "Act").

BACKGROUND

On October 29, 2008, Plaintiff filed an application for disability insurance benefits, alleging he became disabled on September 4, 2008. AR¹ 190-203. The Social Security Administration ("SSA") denied Plaintiff's application initially and on reconsideration. AR 82-83, 84-85. Administrative law judge ("ALJ") Michael B. Kennett held a hearing on September 23, 2011. Plaintiff appeared with counsel. AR 52-81. In a decision dated October 14, 2011, the ALJ found Plaintiff was not disabled. AR 26-39. Plaintiff requested review of the ALJ's decision by the Appeals Council, and the ALJ's decision became the Commissioner's final decision when the Appeals Council denied review on May 11, 2013. AR 1-8.

On July 10, 2013, Plaintiff filed an Application to Proceed in Forma Pauperis (Dkt. #1) and submitted a Complaint (Dkt. #4) in federal court, seeking judicial review of the

¹ AR refers to the Administrative Record, which was delivered to the undersigned upon the Commissioner's filing of her Answer (Dkt. #9) on October 21, 2013.

Commissioner's decision pursuant to 42 U.S.C. § 405(g). The Commissioner filed her Answer (Dkt. #9) on October 21, 2013. Plaintiff filed a Motion for Remand (Dkt. #12), and the Commissioner filed a Response and Cross-Motion to Affirm (Dkt. ##15, 16) on February 6, 2014. The court has considered the Motion, the Response and Cross-Motion, and Plaintiff's Reply (Dkt. #18) filed March 3, 2014.

DISCUSSION

I. Judicial Review of Disability Determination.

District courts review administrative decisions in social security benefits cases under 42 U.S.C. § 405(g). *See Akopyan v. Barnhart*, 296 F.3d 852, 854 (9th Cir. 2002). The statute provides that after the Commissioner of Social Security has held a hearing and rendered a final decision, a disability claimant may seek review of the Commissioner's decision by filing a civil lawsuit in federal district court in the judicial district where the disability claimant lives. *See* 42 U.S.C. § 405(g). That statute also provides that the district court may enter, "upon the pleadings and transcripts of the record, a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing." The Ninth Circuit reviews a decision of a District Court affirming, modifying, or reversing a decision of the Commissioner de novo. *See Batson v. Commissioner*, 359 F.3d, 1190, 1193 (9th Cir. 2003).

The Commissioner's findings of fact are conclusive if supported by substantial evidence. 42 U.S.C. § 405(g); *see also Ukolov v. Barnhart*, 420 F.3d 1002 (9th Cir. 2005). However, the Commissioner's findings may be set aside if they are based on legal error or not supported by substantial evidence. *See Stout v. Comm'r, Soc. Sec. Admin.*, 454 F.3d 1050, 1052 (9th Cir. 2006); *see also Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002). The Ninth Circuit defines substantial evidence as "more than a mere scintilla but less than a preponderance; it is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995); *see also Bayliss v. Barnhart*, 427 F.3d 1211, 1214 n. 1 (9th Cir. 2005). In determining whether the Commissioner's findings are supported by substantial evidence, the court "must review the administrative record as a whole,

weighing both the evidence that supports and the evidence that detracts from the Commissioner's conclusion." *Reddick v. Chater*, 157 F.3d 715, 720 (9th Cir. 1998); *see also Smolen v. Chater*, 80 F.3d 1273, 1279 (9th Cir. 1996).

Under the substantial evidence test, the Commissioner's findings must be upheld if supported by inferences reasonably drawn from the record. *Batson*, 359 F.3d at 1193. When the evidence will support more than one rational interpretation, the court must defer to the Commissioner's interpretation. *See Burch v. Barnhart*, 400 F.3d 676, 679 (9th Cir. 2005); *see also Flaten v. Sec'y of Health and Human Serv.*, 44 F.3d 1453, 1457 (9th Cir. 1995). Consequently, the issue before the court is not whether the Commissioner could reasonably have reached a different conclusion, but whether the final decision is supported by substantial evidence.

It is incumbent on the ALJ to make specific findings so that the court does not speculate as to the basis of the findings when determining if the Commissioner's decision is supported by substantial evidence. Mere cursory findings of fact without explicit statements as to what portions of the evidence were accepted or rejected are not sufficient. *See Lewin v. Schweiker*, 654 F.2d 631, 634 (9th Cir. 1981). The ALJ's findings "should be as comprehensive and analytical as feasible, and where appropriate, should include a statement of subordinate factual foundations on which the ultimate factual conclusions are based." *Id.*

II. Disability Evaluation Process

The claimant has the initial burden of proving disability. *See Roberts v. Shalala*, 66 F.3d 179, 182 (9th Cir. 1995), *cert. denied*, 517 U.S. 1122 (1996). To meet this burden, a claimant must demonstrate an "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected . . . to last for a continuous period of not less than 12 months." 42 U.S.C. § 423(d)(1)(A). The claimant must provide "specific medical evidence" to support his or her claim of disability. If a claimant establishes an inability to perform his or her prior work, the burden shifts to the Commissioner to show that the claimant can perform other substantial gainful work that exists in the national economy. *Batson*, 157 F.3d at 721.

1 The ALJ follows a five-step sequential evaluation process in determining whether an
2 individual is disabled. *See* 20 C.F.R. § 416.920; *see also Bowen v. Yuckert*, 482 U.S. 137, 140
3 (1987). If at any step the ALJ makes a finding of disability or non-disability, no further
4 evaluation is required. *See* 20 C.F.R. §§ 404.1520(a)(4) and 416.920(a)(4); *see also Barnhart v.*
5 *Thomas*, 540 U.S. 20, 24 (2003). The first step requires the ALJ to determine whether the
6 individual is currently engaging in substantial gainful activity (“SGA”). *See* 20 C.F.R.
7 §§ 404.1520(b) and 416.920(b). SGA is defined as work activity that is both substantial and
8 gainful; it involves doing significant physical or mental activities, usually for pay or profit. *See*
9 20 C.F.R. §§ 404.1572(a)-(b) and 416.972(a)-(b). If the individual is currently engaging in SGA,
10 then a finding of not disabled is made. If the individual is not engaging in SGA, then the
11 analysis proceeds to the second step.

12 The second step addresses whether the individual has a medically-determinable
13 impairment that is severe or a combination of impairments that significantly limits him or her
14 from performing basic work activities. *See* C.F.R. §§ 404.1520(c) and 416.920(c). An
15 impairment or combination of impairments is not severe when medical and other evidence
16 establish only a slight abnormality or a combination of slight abnormalities that would have no
17 more than a minimal effect on the individual’s ability to work. *See* C.F.R. §§ 404.1521 and
18 416.921; Social Security Rulings (“SSRs”) 85-28, 96-3p, and 96-4p.² If the individual does not
19 have a severe medically-determinable impairment or combination of impairments, then a finding
20 of not disabled is made. If the individual has a severe medically-determinable impairment or
21 combination of impairments, then the analysis proceeds to the third step.

22 Step three requires the ALJ to determine whether the individual’s impairments or
23 combination of impairments meet or medically equal the criteria of an impairment listed in 20
24 C.F.R. Part 404, Subpart P, Appendix 1. *See* 20 C.F.R. §§ 404.1520(d), 404.1525, 404.1526,
25 416.920(d), 416.925, and 416.826. If the individual’s impairment or combination of

26 ² SSRs are the SSA’s official interpretations of the Act and its regulations. *See Bray v. Comm’r*
27 *of Soc. Sec. Admin.*, 554 F.3d 1219, 1224 (9th Cir. 2009); *see also* 20 C.F.R. § 402.35(b)(1).
28 They are entitled to some deference as long as they are consistent with the Act and regulations.
See Bray, 554 F. 3d at 1223 (finding ALJ erred in disregarding SSR 85-41).

1 impairments meet or equal the criteria of a listing and meet the duration requirement (20 C.F.R.
2 §§ 404.1509 and 416.909), then a finding of disabled is made. *See* 20 C.F.R. §§ 404.1520(h) and
3 416.920(h). If the individual's impairment or combination of impairments does not meet or
4 equal the criteria of a listing or meet the duration requirement, then the analysis proceeds to the
5 next step.

6 Before considering step four of the sequential evaluation process, the ALJ must first
7 determine the individual's residual functional capacity ("RFC"). *See* 20 C.F.R. §§ 404.1520(e)
8 and 416.920(e). RFC is a function-by-function assessment of the individual's ability to do
9 physical and mental work-related activities on a sustained basis despite limitations from
10 impairments. *See* SSR 96-8p. In making this finding, the ALJ must consider all the relevant
11 evidence such as symptoms and the extent to which they can be reasonably be accepted as
12 consistent with the objective medical evidence and other evidence. *See* 20 C.F.R. §§ 404.1529
13 and 416.929; SSRs 96-4p and 96-7p. To the extent that statements about the intensity,
14 persistence, or functionally limiting effects of pain or other symptoms are not substantiated by
15 objective medical evidence, the ALJ must make a finding on the credibility of the individual's
16 statements based on a consideration of the entire case record. The ALJ must also consider
17 opinion evidence in accordance with the requirements of 20 C.F.R. §§ 404.1527 and 416.927 and
18 SSRs 96-2p, 96-5p, and 06-3p.

19 The fourth step requires the ALJ to determine whether the individual has the RFC to
20 perform his past relevant work ("PRW"). *See* 20 C.F.R. §§ 404.1520(f) and 416.920(f). PRW
21 means work performed either as the individual actually performed it or as it is generally
22 performed in the national economy within the last fifteen years or fifteen years prior to the date
23 that disability must be established. In addition, the work must have lasted long enough for the
24 individual to learn the job and to perform it as SGA. *See* 20 C.F.R. §§ 404.1560(b), 404.1565,
25 419.960(b), and 416.965. If the individual has the RFC to perform his past work, then a finding
26 of not disabled is made. If the individual is unable to perform any PRW or does not have any
27 PRW, then the analysis proceeds to the fifth and final step.

1 Step five requires the ALJ to determine whether the individual is able to do any other
2 work considering his RFC, age, education, and work experience. 20 C.F.R. §§ 404.1520(g) and
3 416.920(g). If he or she can do other work, then a finding of not disabled is made. Although the
4 individual generally continues to have the burden of proving disability at this step, a limited
5 burden of going forward with the evidence shifts to the Commissioner. The Commissioner is
6 responsible for providing evidence that demonstrates that other work exists in significant
7 numbers in the national economy that the individual can do. *Yuckert*, 482 U.S. at 141-42.

8 **III. Factual Background.**

9 **A. Testimony at Administrative Hearing.**

10 Serrano appeared at the administrative hearing with the assistance of a Spanish interpreter
11 and was represented by counsel, Brandon Wright. Serrano testified he was born in El Salvador
12 January 15, 1964. AR 56. He has been in the United States for twenty-three years and is
13 married, living with his wife and two children. *Id.* Serrano testified he had an eighth grade
14 education in El Salvador, and no formal education in the United States. AR 57. He speaks and
15 can read and write a little bit of English. *Id.* At the time of the hearing he was not currently
16 working and had last worked in September 2008. *Id.* He stopped working because he was blind
17 in his left eye, had diabetes and high blood pressure. AR 58. He developed his eye problem in
18 2005 when he was forty-one. *Id.* The ALJ noted that this testimony was inconsistent with
19 Exhibit 3F that was marked and admitted in the record which indicated he told Dr. Pazekas
20 (phonetic) that the left eye was removed as a child. *Id.* Serrano testified he was 5'2", weighed
21 200 lbs., and was right-handed. AR 59.

22 The ALJ inquired of counsel regarding his theory of disability for Mr. Serrano. Counsel
23 indicated he believed Serrano qualified under listings 2.02-2.04 for his impaired vision, and
24 12.04 for depression. *Id.* Counsel also indicated that, although the diabetes listing had been
25 removed, he believed Serrano's significant challenges taken together would make it challenging
26 to maintain employment in the national economy. *Id.*

27 Serrano testified that he was currently seeing Dr. Alvarado at the Guadalupe Medical
28 Center for medical care. *Id.* Serrano believed the loss of his eye interfered with his ability to

1 work as well as his diabetes and high blood pressure because his sugar level was constantly
2 increasing. AR 60. At the time of the administrative hearing he did not use anything to walk or
3 keep his balance such as a cane, crutch or walker and did not wear any braces or supports. *Id.*
4 He smoked approximately 10-15 cigarettes a day. *Id.* He occasionally drank alcohol every six
5 or seven months. AR 61. The ALJ pointed out that counsel let him know that Exhibit 18F
6 reflects a history of alcoholism, and that Exhibit 17F, records from Valley Hospital, indicate a
7 Valley Hospital admission for diabetic ketoacidosis reflected Serrano was counseled about
8 alcohol's effect on diabetes. *Id.*

9 Serrano denied he had ever used illegal drugs. *Id.* He had a driver's license and
10 occasionally drove an automatic transmission. *Id.* His wife did most of the cooking. Serrano
11 helped his wife sweep sometimes, but did not do any other chores such as pet care or yard work.
12 AR 62. Serrano testified he watched television and sometimes used a computer to watch news
13 from his native country. *Id.* He did not go to church, but liked to go fishing. *Id.* He last went
14 fishing at Lake Mead about two months prior to the hearing. AR 63. He estimated he could stay
15 on his feet about ten minutes standing or walking. *Id.* After that he had problems with his lower
16 back. *Id.* The pain sometimes spread into his legs or hip halfway down through the thigh. *Id.*

17 Serrano testified that on an average day, he was able to sit for about a half hour before
18 shifting positions. AR 64. He has back pain when he sits. *Id.* He could lift twenty pounds
19 before experiencing back pain. *Id.*

20 In response to questions posed by his own attorney, Serrano testified that he last drank
21 two months prior to the hearing. AR 64. He drank a lot before that and specifically before he
22 had the accident involving his eye. *Id.* His eye problem and blood pressure and sugar level
23 caused him to cut down on his drinking. AR 65. Serrano had never lost a job because of his eye.
24 AR 66. His normal blood sugar in the morning is 180, "and then I start implementing my diet."
25 *Id.*

26 The ALJ asked Serrano if he tried to eat something in the evening before bed. *Id.*
27 Serrano said that he did not and had supper at 6:00 p.m. The ALJ advised Serrano that he also
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1 was diabetic, had high blood pressure and heart disease, and that Serrano should try eating
2 something before bed so that his blood sugar was not so high in the morning. *Id.*

3 Serrano testified that he ran into and bumped into walls often. His wife helped him shave
4 his left side. *Id.* He had been diagnosed with depression and was on medication every day for it.
5 *Id.* He once tried suicide approximately six years prior by slashing a vein on his arm. AR 69.
6 When asked whether he had problems concentrating he responded “a little bit.” AR 70. His
7 memory was “fairly good.” *Id.*

8 Vocational Expert (“VE”) Bernard Preston testified he was familiar with the
9 Commissioner’s definitions concerning skill and exertional levels. AR 71. Serrano’s past
10 relevant work as a kitchen worker is a medium level SVP skill level two, which is unskilled. *Id.*
11 His porter position was a medium level unskilled work. *Id.* The ALJ posed the following
12 hypothetical: assuming a claimant of Serrano’s age, education and past relevant work, blind in
13 left eye, with depth perception problems, problems reaching overhead with the right upper
14 extremity, limited to unskilled work with a medium residual functional capacity, able to lift
15 twenty-five pounds frequently, fifty pounds occasionally, the ability to be on time and on his feet
16 6 out of 8 hours per day. The ALJ asked whether this hypothetical claimant could do Serrano’s
17 past relevant work. AR 71-72. The VE responded that the eyes were not a requirement under
18 the DOT³ for his past relevant work. AR 72. However, a limitation in reaching would eliminate
19 the kitchen worker position which requires constant reaching. *Id.* Serrano could do the porter
20 job with the limitations the ALJ described according to the DOT. AR 73. The VE clarified that
21 DOT assumes a person has two eyes “but again, the hypothetical indicated, and the DOT
22 requires not present which is kind of a grey area in DOT.” *Id.*

23 The ALJ posed an additional hypothetical: assuming a hypothetical claimant was limited
24 to light residual functional capacity, that is, lifting ten pounds frequently, twenty pounds
25 occasionally on his feet 6 out of 8 hours a day with all of the earlier described descriptions, and
26 asked whether this hypothetical claimant could do Serrano’s past relevant work. AR 73. The
27

28 ³ DOT refers to the *Dictionary of Occupational Titles*.

1 VE testified that there were jobs such a hypothetical claimant could perform that exist in the
2 national economy such as cafeteria attendant which is a light, unskilled job. AR 74. In Nevada,
3 there were 2,336 such positions, and 114,633 positions nationally. Such a claimant could also
4 work as a carwash attendant which is an unskilled position. *Id.* The ALJ rejected this testimony
5 suggesting that someone with depth perception and peripheral vision problems should not be
6 around moving vehicles because of the hazard of being run over. AR 74-75. The VE testified
7 Serrano could also work as an usher which is an unskilled, light job with 1,460 jobs in Nevada,
8 and 84,238 jobs nationwide. AR 75.

9 On cross-examination, the VE testified that a limitation of occasional visual acuities
10 would eliminate the usher position, but not the cafeteria position. AR 76.

11 The ALJ clarified the hypothetical. He asked whether a hypothetical claimant of
12 Serrano's age, education, past relevant work limited to a light RFC on everything except the eyes
13 and limited to unskilled work with no depth perception because he only had one eye and no
14 peripheral vision to the left eye, could still do the cafeteria attendant job. AR 77-78. The VE
15 testified such a claimant could not, but would be able to do the usher job. AR 78. DOT has
16 different categories "non-present, occasional, frequent, and constant" and "it's tricky because
17 they're assuming two eyes." *Id.* However, the visual problems would not impact Serrano's
18 ability to be an usher or a porter because under the DOT regulations, depth perception and near
19 acuity are "non-present" which means they are not a requirement for the jobs. AR 79.

20 Before the hearing adjourned, counsel for Serrano directed the ALJ's attention to a note
21 in the record at 13F that reflected when Serrano went in to have an eye prosthetic inserted. AR
22 80.

23 **B. Plaintiff's Medical Records.**

24 Plaintiff stipulated that the ALJ fairly and accurately summarized the evidence and
25 testimony of record except as argued to the contrary in his brief. The Commissioner's brief
26 called the court's attention to an August 27, 2009 comprehensive internal medical evaluation
27 performed by Dr. Karl Fazekas, the January 28, 2010 orthopedic evaluation conducted by
28 Conrad O. Yu, and the mental status consultative evaluation performed by Dr. Maria Doncaster,

1 PhD, on March 3, 2010. The Commissioner's brief also cited treatment records for Serrano's
2 diabetes and miscellaneous ailments.

3 **IV. The ALJ's Decision.**

4 The ALJ concluded that Serrano had not been under a disability within the meaning of
5 the Social Security Act from September 4, 2008, through the date of his October 14, 2011
6 decision. AR 33-42. He found that Serrano met the insured status requirements through
7 December 31, 2013, and had not engaged in substantial gainful activities since September 4,
8 2008, the alleged onset date. AR 35. He found Serrano had severe impairments consisting of:
9 left eye blindness, diabetes mellitus (insulin dependent), hypertension, degenerative joint disease
10 of the upper right extremity, and depression. *Id.* Serrano did not have an impairment or
11 combination of impairments that met or medically equaled the severity of one of the listed
12 impairments. *Id.*

13 In making this determination, he considered Listings 2.02 regarding loss of visual acuity,
14 2.03 regarding contraction of the visual field in the better eye, 2.04 regarding loss of visual
15 efficiency, and 9.08 regarding diabetes mellitus. Serrano did not meet or medically equal listing
16 2.02 because his best corrected vision in the right eye was 20/30 and the Listing requires best eye
17 correction of 20/200 or less to qualify. AR 36. Serrano did not meet or medically equal Listing
18 2.03 because he had full visual acuity in the right eye. *Id.* He did not meet or medically equal
19 Listing 2.04 because there was no evidence that he had a visual efficient of the right eye of
20 twenty percent or less after best correction. *Id.* He did not meet listing 9.08 because there was
21 no evidence of neuropathy demonstrated by significant and persistent disorganization of motor
22 function in two extremities resulting in sustained disturbance of gross and dexterous movements,
23 or gait and station; acidosis occurring at least on average of once every two months documented
24 by appropriate blood chemical test; or retinitis proliferans.

25 The ALJ also found that the severity of Serrano's mental impairment did not meet or
26 medically equal the criteria of Listing 12.04 considering the "Paragraph B" criteria. *Id.* The
27 ALJ found Serrano had no restriction in activities of daily living and social functioning. *Id.* He
28 found Serrano had moderate difficulties for detailed and complex tasks with regard to

1 concentration, persistence or pace, but no limitations for tasks involving simple one-or-two step
2 instructions. AR 36. The ALJ's opinion acknowledged that the psychological examiner found
3 that Serrano's ability to handle and understand detailed and complex tasks and instructions was
4 poor. However, she found that Serrano should have no difficulty with simple one-or-two step
5 instructions. Based on these findings, the ALJ found the claimant had moderate limitation
6 regarding detailed and complex tasks and no limitations for simple tasks. *Id.* There were no
7 episodes of decompensation of extended duration. *Id.* As a result, the ALJ found that Serrano's
8 mental impairment did not cause at least two "marked" and repeated episodes of decompensation
9 of extended duration, and therefore, did not meet the "Paragraph B" criteria. AR 37.

10 The ALJ also considered the "Paragraph C" criteria of Listing 12.04. There was no
11 medically documented history of chronic affective disorder of at least two years' duration
12 causing more than minimal limitation of the ability to do basic work activities, with symptoms or
13 signs currently attenuated by medical or psychological support and repeated episodes of
14 decompensation of extended duration, or a residual disease process resulting in such marginal
15 adjustment that even a minimal increase in mental demand or change in environment would be
16 predicted to cause the claimant to decompensate. *Id.* There was also no current history of one or
17 more years' inability to function outside a highly supportive living arrangement, with an
18 indication of continued need for such an arrangement.

19 After considering the record as a whole, the ALJ found that Serrano had the residual
20 functional capacity to perform unskilled medium work as defined in 20 C.F.R. 404.1567(c) and
21 416.967(c), except that he had no peripheral vision in the left eye, no depth perception, and was
22 limited to unskilled work. *Id.* The ALJ also found that overhead reaching with the right upper
23 extremity was limited to frequent, rather than constant. *Id.*, citing Exhibit 8F-4. The ALJ found
24 that Serrano's statements concerning the intensity, persistence and limiting effects of his
25 symptoms were not credible to the extent they were inconsistent with his RFC assessment,
26 because they were not supported by objective medical signs and findings of the record as a whole
27 under SSR 96-7p. AR 38. The opinion summarized the portions of the medical record on which
28 the ALJ relied in reaching his findings at AR 38-41.

1 The ALJ gave great weight to the internal medicine evaluation performed by Dr. Karl
2 Fazekas, the consultative examiner who performed his evaluation August 27, 2009. AR 38. Dr.
3 Fazekas found that Serrano could occasionally lift and/or carry fifty pounds, frequently lift
4 and/or carry twenty-five pounds, and sit, stand or walk eight hours in an eight-hour workday.
5 AR 39. Dr. Fazekas also found Serrano was limited in his ability to see secondary to the loss of
6 the left eye. AR 39. The ALJ gave his opinion great weight because it was based on a thorough
7 examination of the claimant and consistent with the medical evidence. *Id.*

8 The ALJ gave some weight to the February 9, 2010, state agency medical consultant
9 opinion that Serrano could occasionally lift and/or carry twenty pounds, frequently lift and/or
10 carry twenty-five pounds, and sit, stand or walk about six hours in each eight-hour workday. AR
11 39. The ALJ pointed out that in filling out the form, it was clear a mistake had been made in
12 finding Serrano could only occasionally lift twenty pounds, while having the physical capacity to
13 frequently lift twenty-five pounds. *Id.* The same examiner concluded Serrano had a light RFC,
14 meaning he could occasionally lift twenty pounds, and frequently lift ten pounds. AR 40. The
15 state agency consultant determined that Serrano was somewhat limited in his ability to reach
16 overhead, which the ALJ found was supported by the medical evidence that indicated he had
17 mild arthritis of the upper right extremity. *Id.* However, the ALJ found the record did not
18 completely support state agency medical consultant's opinion concerning depth perception
19 limitations or Serrano's ability to lift and/or carry. *Id.* The ALJ relied on Dr. Fazekas' report
20 that Serrano had no physical limitations that would prevent him from engaging in past relevant
21 work at the medium exertional level. *Id.*

22 The ALJ gave great weight to the psychological examination conducted by Dr. Maria
23 Doncaster, PhD, on March 3, 2010. *Id.* Serrano reported to Dr. Doncaster that he felt old and
24 depressed. AR 40. The ALJ's opinion recited specific portions of her report containing
25 Serrano's reports to her, and the results of her testing. *Id.* He gave Dr. Doncaster's opinion great
26 weight because it was based on a thorough examination of Serrano and the opinions were within
27 the area of her expertise. AR 41.
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1 The ALJ gave some weight to the state agency psychologist who opined that Serrano had
2 mild limitation in activities of daily living, no difficulties in maintaining social functioning,
3 moderate difficulties in maintaining concentration, persistence and pace, and no episodes of
4 decompensation of extended duration. *Id.* The ALJ found that Serrano reported no real
5 difficulties in activities of daily living because he was able to feed and bathe himself, help care
6 for his children, prepare meals, and help with light housework such as sweeping. *Id.* Serrano
7 also reported no difficulties in social functioning indicating he regularly visited with friends and
8 family and was capable of engaging in conversation with Dr. Doncaster. *Id.* Concerning
9 concentration, persistence and pace, Dr. Doncaster found that Serrano's ability to handle and
10 understand detailed and complex tasks and instructions was poor. However, Dr. Doncaster also
11 found that Serrano should have no difficulties with simple one-or-two step instructions. For
12 these reasons, the ALJ found that Serrano had moderate limitation regarding detailed and
13 complex tasks, and no limitations for simple tasks. *Id.*

14 The ALJ concluded that Serrano was capable of performing his past relevant as a hotel
15 porter which is rated as SVP 2, medium, and that this work did not require work-related activities
16 precluded by Serrano's RFC. *Id.* This finding was based on the vocational expert's testimony.
17 *Id.* Alternatively, the ALJ found that assuming Serrano could not perform medium work, but
18 could perform light work with the same limitations, the vocational expert testified that Serrano
19 could still perform work as an usher, classified as SVP 2 (unskilled), light, with 1,460 jobs in the
20 State of Nevada, and 84,238 jobs in the national economy. *Id.*

21 **V. The Parties' Positions.**

22 **A. Plaintiff's Motion to Remand (Dkt. #12).**

23 Serrano argues that the ALJ's residual functional capacity is not supported by substantial
24 evidence because the ALJ failed to properly evaluate the medical evidence and that the ALJ's
25 mental RFC assessment is inconsistent with the medical evidence of record. Serrano claims that
26 his severe mental impairment prevents him from performing his past relevant work or the
27 alternative work identified by the vocational expert. The ALJ gave great weight to the opinion
28 of Maria Doncaster, Ph.D, the consultative examiner who opined that Serrano was limited to

1 simple one-or-two-step instructions. Serrano argues that the ALJ's finding of a limitation to
2 unskilled work does not adequately take into account this limitation. Because the ALJ gave great
3 weight to the opinions of Dr. Doncaster, the court should credit that limitation as true.

4 Serrano argues that the alternative occupations identified by the vocational expert are
5 unskilled, but require more than carrying out one-or-two-step tasks. Hotel porter and usher
6 requires a reasoning level two, which requires the ability to apply common sense understanding
7 to carry out detailed, but uninvolved written or oral instructions, and deal with problems
8 involving a few concrete variables in or from standardized situations. Serrano contends that a
9 limitation to one to two-step jobs "relegates him to reasoning level one jobs only."

10 Serrano concedes that the ALJ properly used the services of a vocational expert, but
11 argues the ALJ failed to pose a hypothetical that adequately took into account all of his
12 limitations, specifically, inclusion of a limitation of simple one-or-two-step instructions. Thus,
13 the vocational expert's testimony lacks support in the record or is incomplete and has absolutely
14 no evidentiary value. The Commissioner has the burden to demonstrate the existence of any
15 element of the disability equation at step five of the sequential evaluation process, and the ALJ's
16 failure to sustain his burden at step five mandates that the court set aside his decision. The court
17 should therefore reverse and award benefits, or alternatively, remand for taking additional
18 vocational testimony.

19 Serrano also argues that the ALJ committed legal error by impermissively rejecting
20 Serrano's subjective symptom testimony. The medical evidence in this case demonstrates the
21 presence of left-eye blindness, diabetes mellitus (insulin dependent), hypertension, degenerative
22 joint disease of the right upper extremity, and depression. In evaluating Serrano's complaints of
23 limitation, the ALJ and the court are obliged to consider the testimony in light of the record as a
24 whole. In this case, there is no evidence of malingering and the ALJ found none. The ALJ
25 failed to articulate clear and convincing reasons supported by substantial evidence for finding
26 Serrano not fully credible in his complaints. Because the ALJ did not articulate sufficient
27 reasons for rejecting Serrano's truthful and medically-supported testimony that he lacked the
28 ability to engage in full-time, competitive employment on a consistent basis, the court must

1 apply the “Smolen” test and remand for an immediate award of benefits. Alternatively, the court
2 should remand for proper evaluation of Serrano’s complaints including the taking of vocational
3 expert testimony.

4 **B. The Commissioner’s Response & Cross-Motion to Affirm (Dkt. ##15, 16).**

5 The Commissioner argues that substantial evidence supports the ALJ’s residual
6 functional capacity determination that Plaintiff was capable of unskilled work. At the hearing,
7 the vocational expert testified that a hypothetical person with Plaintiff’s limitations could
8 perform Plaintiff’s past relevant work as a porter or an usher—both of which are rated by the
9 DOT as jobs requiring a reasoning level of two. The Commissioner argues that the record does
10 not support Plaintiff’s argument that he is restricted to one-or-two-step instructions. The
11 Commissioner maintains that Serrano mischaracterizes Dr. Doncaster’s consultative report to
12 support this claim. Dr. Doncaster concluded that Plaintiff’s ability to handle complex and
13 detailed instructions was poor, but his ability to handle simple one-or-two-step instructions was
14 intact. Dr. Doncaster concluded that Plaintiff was, at a minimum, capable of understanding,
15 remembering and carrying out simple one-or-two-step instructions. This means she described
16 Serrano’s functional abilities as a range, somewhere between simple instructions at a minimum,
17 and below complex and detailed instructions. By contrast, SSR 96-8p defines an RFC as “the
18 individual’s maximum remaining ability to do sustained work activities in an ordinary work
19 setting on a regular and continuing basis.” Dr. Doncaster did not address Plaintiff’s maximum
20 remaining ability and only indicated that it was above the level of simple one-or-two-step
21 instructions, and therefore there is no basis for Plaintiff to argue his RFC should be limited to
22 one-or-two-step instructions.

23 The Commissioner argues that even if Dr. Doncaster had actually found Plaintiff limited
24 to jobs of one-or-two step instructions, the majority of courts in this circuit have rejected
25 Plaintiff’s arguments that the restriction is incompatible with reasoning level two jobs. The
26 Commissioner cites *Meisel v. Barnhart*, 403 F.Supp 2d 981, 983-84 (C.D. Cal. 2005) which held
27 against the Plaintiff’s position. The record in this case shows Plaintiff is not limited to jobs
28 requiring an ability to follow simple one-or-two-step instructions. Plaintiff performed the job of

1 a hotel porter and thus his claim that he lacks the general educational background to perform this
2 job “makes no sense.” Unskilled work requires “little or no judgment to do simple duties that
3 can be learned on the job in a short period of time.” 20 C.F.R. § 404.1568(a). It was therefore
4 reasonable for the ALJ to translate Dr. Doncaster’s findings into a restriction to unskilled work.

5 The Commissioner also argues that substantial evidence supports the ALJ’s credibility
6 analysis. Plaintiff’s motion does not explain how his statements regarding his symptoms and
7 limitations, if the ALJ had fully credited them, would establish his disability. He fails to identify
8 any of the testimony he claims the ALJ rejected. Plaintiff has the burden of proving disability
9 and his failure to present evidence in support of his claim or point out the error in the ALJ’s
10 decision is therefore tantamount to waiver.

11 However, on the merits of this claim, the court must determine whether there is a rational
12 basis for the ALJ’s credibility determination. Questions of credibility and resolving conflicts in
13 the testimony are the responsibility of the ALJ. The ALJ summarized the medical record and
14 justified his decision in almost four pages. For example, the ALJ pointed out that Dr. Karl
15 Fazekas, the consultative examiner, evaluated Serrano and found there was no sign of loss or
16 damage of any kind to Plaintiff’s right eye, that Plaintiff’s range of motion was within normal
17 limits, that his motor strength was five out of five, and that he had a normal gait and intact
18 sensation throughout. The ALJ cited the records of Dr. Yu who found AC joint arthritis with
19 right shoulder impingement and also relied on Dr. Doncaster’s psychiatric evaluation in setting
20 mental health limitations.

21 At the hearing, Plaintiff testified that in addition to his impaired vision, the medical
22 problems that interfered with his ability to work included his diabetes and high blood pressure.
23 However, the ALJ noted the record reflected improvement in Plaintiff’s diabetes, and that in
24 2011, his glucose levels were significantly lower than they had been in the previous year. New
25 evidence was submitted directly to the Appeals Council after the ALJ’s decision which
26 confirmed the positive trend. In six visits to a clinic between March 18, 2010, and October 25,
27 2010, the health care professionals Plaintiff saw reported he was well nourished and well
28 developed and “in no acute distress.” Plaintiff stated he was feeling generally well and denied

1 any new complaints or problems. On other occasions, Serrano's complaints were limited to
2 itchiness, diarrhea, sore throat and sinus congestion. Additionally, Plaintiff's therapist noted
3 Plaintiff was making good progress, felt better, and was coping with unemployment and other
4 stress in more appropriate ways. Plaintiff himself testified at the hearing that he used no
5 assistive devices, and was still able to drive and go fishing. All of this evidence is more than
6 enough to support the ALJ's decision and defeat Plaintiff's undeveloped claim.

7 The Commissioner asks that the court deny the motion to remand and affirm the
8 Commissioner's decision. If the court feels that legal error was committed, the appropriate
9 remedy is to remand the case for further administrative development.

10 **C. Plaintiff's Reply (Dkt. #18).**

11 Plaintiff's reply reiterates arguments that the ALJ's residual functional capacity
12 assessment was not based on substantial evidence in the record. The ALJ did not reasonably
13 interpret Dr. Doncaster's opinions that describe Serrano's ability as a range from a minimum to
14 handling simple instructions to a maximum of somewhere below complex and detailed
15 instructions. A common-sense understanding of this opinion is that Serrano is limited to simple
16 one-or-two-step instructions. This would preclude Serrano from performing his past relevant
17 work as a hotel porter and the occupations identified by the vocational expert.

18 Serrano maintains that the district courts in the Ninth Circuit are split as to whether a
19 limitation to simple tasks with only one-or-two-step instructions is consistent with jobs described
20 in the DOT requiring GED reasoning higher than level one.

21 Serrano also argues that the ALJ committed legal error by not offering a single legally
22 sufficient reason to discount his testimony and that the court should either reverse for an award
23 of benefits or remand for proper evaluation of Serrano's subjective complaints.

24 **VI. Analysis and Findings.**

25 **A. The ALJ's RFC Findings.**

26 Serrano's brief does not say what medical evidence the ALJ failed to consider in reaching
27 his RFC. At most, Serrano claims the ALJ misinterpreted Dr. Doncaster's report and findings.
28 Serrano does not claim that any of his physical impairments preclude him from working. Rather,

1 he argues the occupations identified by the vocational expert limited him to unskilled jobs
2 requiring one-or-two-step instructions which is consistent with jobs described in the DOT
3 requiring GED reasoning higher than level one.

4 Reviewing the record as a whole, the court finds the ALJ did not err in his RFC
5 assessment that Plaintiff was capable of performing his past relevant work as a porter or an
6 usher. CSR 96-8p defines an RFC as “the individual’s maximum ability to do sustained work
7 activities in an ordinary work setting on a regular and continuous basis.” Serrano had been
8 performing the job of porter until he was fired, according to his own report, for falling asleep on
9 the job which he attributed to his diabetes. AR 312. Serrano did not claim that he experienced
10 any difficulties concentrating, following instructions or remembering job tasks assigned to him
11 while working. In fact, he testified at the administrative hearing that he only had “a little bit” of
12 a problem concentrating, and that his memory was “fairly good.” AR 70.

13 The ALJ gave great weight to the psychological examination conducted by Dr. Maria
14 Doncaster, PhD, on March 3, 2010. Dr. Doncaster reviewed Serrano’s adult function report and
15 asked Plaintiff about his current complaints and history. Plaintiff told Dr. Doncaster he was fired
16 from the Mandalay Bay for falling asleep on the job on the 10 p.m. to 6 a.m. shift. AR 312.
17 Serrano told Dr. Doncaster that he was able to understand, remember, and follow simple one-or-
18 two-step instructions, to understand, remember, follow detailed instruction, but that his ability to
19 understand, remember, and follow extensive complex instructions was poor. AR 313.

20 Dr. Doncaster performed a mental status examination assessing Serrano’s concentration,
21 attention and memory skills. She conducted a subset of tests and concluded Serrano’s overall
22 ability to understand, remember, and carry out an extensive variety of complex instructions was
23 poor based on his performance on evaluation and observations of interview behavior. AR 314.
24 She found that Serrano was unable to carry out detailed instructions based on his performance on
25 assessment and interview. *Id.* However, he had the ability to carry out simple one-or-two-step
26 instructions, and follow simple instructions on a sustained basis. AR 314-15. Dr. Doncaster’s
27 report noted Serrano’s attention, concentration and memory were variable “as was his
28 motivation” and that Serrano exhibited “variable effort throughout the assessment.” AR 315.

1 She determined, based on his performance at the assessment, that cognitively Serrano “would
2 have trouble returning to the competitive work place as he is slow and demonstrates variable
3 cognitive skills due to variable motivation.” *Id.*

4 The court finds that the ALJ gave appropriate weight to Dr. Doncaster’s opinions in
5 determining that Serrano retained the ability to follow one-or-two-step instructions and did not
6 commit legal error in finding Serrano could perform his past relevant work as a porter. The
7 ALJ’s findings were also supported by the mental residual functional capacity assessment
8 conducted March 9, 2010, by medical consultant, Pastora Roldan, PhD. AR 330-333. Dr.
9 Roldan found Serrano’s understanding and memory and ability to understand or remember very
10 short and simple instructions was not significantly limited and that his ability to understand or
11 remember detailed instructions was moderately limited. AR 330. She found his ability to carry
12 out very short and simple instructions was not significantly limited, his ability to carry out
13 detailed out instructions was moderately limited, and that he had no significant limitations in the
14 ability to maintain attention and concentration for extended periods, perform activities with a
15 schedule, maintain regular attendance and be punctual, and make simple work-related decisions.
16 He also found that he had no significant limitations in social interaction and adaptation. AR 331.
17 Reviewing the record as a whole, the court found no indication that Serrano ever reported he was
18 unable to work because of difficulty paying attention, concentrating, remembering or following
19 instructions. At most, his adult function report stated his wife had to remind him to take his
20 medication sometimes. AR 235. Serrano also reported that he sometimes forgot his son’s school
21 schedule and had to be reminded to pick him up. AR 240. The majority of his complaints in
22 filling out the function report concerned his eye.

23 In short, the court finds that the ALJ did not err in concluding Serrano had the RFC to
24 perform his past relevant work as a porter.

25 **B. The ALJ’s Credibility Determination.**

26 Serrano’s motion to remand and reply brief do not cite a single statement Serrano made
27 in the record that the ALJ concluded was not credible, or if fully credited, would establish
28 Serrano had a disability that made him incapable of working. The record in this case establishes

1 that counsel for Serrano has changed positions regarding the nature of Serrano's alleged
2 impairments which render him incapable of performing substantial gainful activity. At the
3 Administrative Hearing, counsel for Serrano claimed that Serrano was disabled because he met
4 the Listing criteria for his impaired vision under 2.02 – 2.04. AR 59. Counsel also argued that
5 he met the 12.04 Listing for depression. These arguments were abandoned on appeal to the
6 Appeals Council and were not raised here. In his brief to the Appeals Council, Serrano's counsel
7 argued the ALJ erred because the evidence of record demonstrates that the Administrative
8 Record supported an RFC for sedentary exertion at best. AR 255. This argument was based on
9 evidence submitted to the Appeals Council on May 10, May 31, and July 16, 2012, as well as
10 exhibits in the existing Administrative Record. Counsel for Serrano argued that a sedentary
11 limitation would support a finding of disabled January 15, 2009, Serrano's forty-fifth birthday
12 under Rule 201.17. AR 255. The brief submitted to the Appeals Council also claimed that
13 Serrano had a severe mental impairment that prevented him from performing his past relevant
14 work because he was limited to simple one-or-two-step instructions. AR 255. Additionally,
15 Serrano argued to the Appeals Council that the ALJ failed to properly evaluate his subjective
16 complaints, but, like here, did not state what subjective complaints the ALJ failed to properly
17 evaluate. AR 256.

18 As indicated, Serrano himself testified at the administrative hearing that he could no
19 longer work because he was blind in his left eye, had diabetes and high blood pressure. AR 58.
20 He testified that the loss of his eye interfered with his ability to work as well as his diabetes and
21 high blood pressure because his sugar level was constantly increasing. AR 60. Serrano did not
22 testify that he lacked the ability to concentrate, follow instructions, or remember work-related
23 tasks for the job he performed for many years. Rather, he told Dr. Doncaster that he was fired
24 for falling asleep. He testified at the administrative hearing that his diabetes caused him to fall
25 asleep. His adult function report claimed his primary complaints were related to his vision. He
26 also claimed he had trouble falling asleep.

27 Serrano has the burden of establishing that he is unable to engage in any substantial
28 gainful activity because of medically determinable physical or mental impairments which could

1 be expected to last for a continuous period of not less than twelve months. He has not explained
2 how his statements regarding his symptoms and limitations, if the ALJ had credited them as true,
3 would establish his disability. Further, the ALJ found only that Serrano's subjective complaints
4 concerning intensity, persistence and the limiting effect of his symptoms were not fully credible
5 to the extent they were inconsistent with his RFC determination. This was not error.


6 **VII. Conclusion.**

7 Reviewing the record as a whole, the court finds the ALJ's decision is supported by
8 substantial evidence and should be upheld.

9 For the reasons stated,

10 **IT IS RECOMMENDED** that Serrano's Motion to Remand (Dkt. #12) be **DENIED**, and
11 that the Cross Motion to Affirm (Dkt. #15) be **GRANTED**.

12 Dated this 2nd day of September, 2015.

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15 PEGGY A. TEEN
16 UNITED STATES MAGISTRATE JUDGE
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